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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 16 & No. 22

JERRY DOUGLAS MEMPA,

Petitioner,

v.

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

WILLIAM EARL WALKLING,

Petitioner,

v.

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

On Writs Of Certiorari To The Supreme Court Of Washington

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
ON BEHALF OF THE
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
TOGETHER WITH BRIEF AMICUS CURIAE**

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**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE.**

The National Legal Aid and Defender Association hereby respectfully moves for leave to file a brief *amicus curiae* in these cases in support of petitioners, as provided in Rule 42 of the Rules of the Court. The consent of the attorneys for the petitioners has been obtained.

The consent of the Attorney General of the State of Washington, attorney for the respondents, was requested but refused.

The National Legal Aid and Defender Association, hereinafter called NLADA, is a non-profit corporation whose primary purpose is to assist in providing more and better legal services for the poor. The NLADA includes among its members the great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the United States, many of which are providing legal representation to indigent defendants at probation violation proceedings. The NLADA also has 1700 professional members, many of whom are practicing attorneys who represent indigent persons in criminal and civil matters.

The NLADA and its members believe that it is vital to the administration of criminal justice that counsel be provided for poor persons at every stage in a criminal proceeding, including a hearing on violation of probation. For this reason the NLADA desires to assist the Court in giving careful and full consideration to the issues presented in these two cases.

The brief for the petitioners necessarily and quite properly views the issues in the two cases primarily from the vantage point of Washington law. The NLADA in its brief, tendered herewith, attempts to cast light on the issues from a national perspective. The brief includes material drawn from the statutes and case law of the several states, scholarly writings, model legislation, original field research conducted by the American Bar Foundation in 1963-64, and questionnaires circulated by NLADA

in 1967 among its defender members as well as some prosecutors and probation offices. It is believed that the NLADA brief includes material supplemental to the petitioners' brief that should be useful to the Court in its consideration of these cases.

In view of the importance of these cases to defender and legal aid attorneys serving the poor throughout the country, the Defender Committee and the executive committee of NLADA have authorized and instructed the NLADA staff attorneys to prepare and file a brief *amicus curiae* in these two cases, if so permitted by the Court.

Wherefore, it is respectfully prayed that this motion for leave to file the annexed brief *amicus curiae* be granted.

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**BRIEF OF THE
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
AMICUS CURIAE.**

INTEREST OF AMICUS CURIAE.

As pointed out in the Motion For Leave To File its Brief Amicus Curiae, the National Legal Aid and Defender Association, hereinafter referred to as NLADA, and its members have a real and vital concern in these cases, since an adverse decision would seriously impair the ability of the members of NLADA to represent indigent clients in such proceedings. NLADA officially takes the position that every jurisdiction should have an adequate defense system to provide competent legal representation for those financially unable to employ counsel. Accordingly NLADA has promulgated Minimum Standards for a Defender System, as adopted by its Assembly of Delegates. These standards have been endorsed by the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association and approved by its House of Delegates, 91 *A.B.A. Reports*, 116, 186, 189-90 (1966). In their particularly relevant portions these standards provide:

Every Defender System should:

1. Provide legal representation for every person who is without financial means to secure competent counsel when charged with a felony, misdemeanor, or other charge where there is a possibility of a jail sentence.

3. Provide representation immediately after the taking into custody or arrest, at the first and every subsequent court appearance and at every stage in the proceeding, including appeal or other post-conviction proceedings to remedy error or injustice. The representation should extend to parole and probation-violation proceed-

ings, extradition proceedings, and proceedings involving possible detention or commitment of minors or alleged mentally ill persons.

8. Provide effectual notice of the available services to all persons whom may be in need thereof. [Emphasis added.] (These standards, adopted in 1965, are published in the *Handbook of Standards for Legal Aid and Defender Offices* (1965), NLADA, American Bar Center, Chicago, Ill. 60637 and in 24 *Legal Aid Brief Case* 66-67 (1965).)

These minimum standards represent the crystallized sentiment of NLADA and its members. The whole legal aid and defender movement will be affected by the determination of these cases, since this will be the first time this court will directly rule on the issue of the right of an indigent to counsel at a probation revocation proceeding.

STATEMENT OF THE CASES.

The essential facts in these two cases are similar. In each instance the defendant pleaded guilty to a serious crime and was placed on probation, the imposition of sentence being suspended. (M.R. 10, 20; W.R. 13) Mempa, Petitioner in No. 16, was arrested four months afterwards, while still only 17 years old, and his probation was revoked after a brief hearing in which the State was represented by counsel but he was not. (M.R. 24-28.) He was not told that he had a right to counsel, and apparently

no effort was made to contact the attorney who had represented him as assigned counsel when he pleaded guilty. At the end of the hearing the judge sentenced Mempa to the state reformatory for a maximum of ten years on the original guilty plea. Six years later, still being a prisoner, Mempa filed a habeas corpus petition in the Washington Supreme Court, the denial of which formed the basis for grant of certiorari by this Court.

The Walkling case, No. 22, which arose in another county, differs in that Walkling was older and apparently wiser, for he had asked counsel to be present to represent him at the probation revocation proceeding. (W.R. 15.) Counsel did not appear, however, and after waiting 15 minutes the judge proceeded, despite Walkling's repeated request that the judge appoint counsel for him. At the end of a brief hearing in which the State was represented by counsel but Walkling was not, the judge revoked the probation and imposed a maximum sentence of 15 years on the original guilty plea. (W.R. 15-16.) After two years of imprisonment Walkling also filed a habeas corpus petition, with the same results as Mempa. Walkling, however, was released on parole in 1967.

For a fuller statement of the cases, we adopt the Petitioners' statement.

SUMMARY OF ARGUMENT.

To permit a defendant of means to employ counsel for a probation violation hearing but deny to a poor person the right to have counsel appointed is contrary to the Equal Protection Clause of the Fourteenth Amendment. This Court has previously recognized that the Equal Protection clause applies to appointment of counsel for appeal in *Douglas v. California*, 372 U.S. 353 (1963) and related cases, and state courts in Alaska and Oregon have applied this principle to probation violation proceedings. The problem of equal access to counsel occurs in at least 17 states besides Washington and the number may be as high as 31.

Quite apart from the Equal Protection clause, the Due Process clause requires that counsel be assigned at probation violation proceedings. The principle of *Gideon v. Wainwright*, 372 U.S. 335 (1963) is broad enough to cover these proceedings. Further, ten states, by judicial decision, statute, or rule of court, now require appointment of counsel, thereby recognizing that counsel is necessary as a matter of public policy if not constitutional law. Most states grant the defendant a right to be heard, and the state is represented at the hearing by counsel, so that the defendant is at an unfair disadvantage if he does not also have counsel. Expert professional opinion, such as the President's Crime Commission and the American Bar Association, have recommended that appointed counsel be provided. Scholarly writing on the subject shows a growing recognition of the importance of counsel, especially in the present decade.

If the Court should require appointment of counsel, the state courts would not be unduly burdened because about half the courts are already appointing counsel, either because state law requires it or because of local practice. The total number of revocations per year appears to be at a level where adequate representation could be provided within existing systems for furnishing counsel to the poor.

Probation begins with an exercise of judicial discretion or favor, but it does not follow that the status of probation may be taken away without certain safeguards. Probation is best defined as a form of liberty, but even if defined as a privilege, it is entitled to at least the same protections as economic privileges, such as the right to practice law and the right to work for the federal government.

ARGUMENT.

I.

THE EQUAL PROTECTION CLAUSE REQUIRES THAT COUNSEL BE ASSIGNED TO AN INDIGENT DEFENDANT IN A PROBATION VIOLATION PROCEEDING IF A DEFENDANT OF MEANS COULD EMPLOY PRIVATE COUNSEL FOR SUCH PROCEEDING.

- A. The principle expressed in *Douglas v. California* and related cases, requiring appointment of counsel for appeal, applies to appointment of counsel in a probation violation proceeding.

As pointed out on page 30 of the Petitioners' brief, the general practice in the State of Washington is to allow retained counsel at probation revocation proceedings. In unmistakable language, this Court has indicated that where the liberty of the individual is involved, it will not sanction discrimination between indigents and those who possess the means to protect their rights. In a series of decisions dealing with discrimination against an indigent defendant beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956) and including *Douglas v. California*, 372 U.S. 353 (1963), *Lane v. Brown*, 372 U.S. 477 (1963), and *Anders v. California*, 386 U.S. 738 (1967), this court has consistently invalidated procedures wherein the rich man has the benefit of counsel at the critical stages in a criminal prosecution while the poor man "is forced to shift for himself." *Anders v. California*, 386 U.S. at 741. *Anders* held that substantial equality and fairness required by the Fourteenth Amendment imposed a duty on California to afford an indigent appellant in a criminal case the

same degree of advocacy that a non-indigent can obtain by virtue of his ability to employ counsel. 386 U.S. at 745.

The Supreme Courts of Alaska and Oregon have discussed the right of an indigent to counsel in probation revocation proceedings in the light of the equal protection clause and the decisions cited above. In *Hoffman v. State*, 404 P. 2d 644 (Alaska 1965), an indigent defendant was sentenced to three years imprisonment after pleading guilty to burglary and larceny. However, the judge suspended all but five months of that sentence, placing the defendant on probation for the remaining time. While he was on probation, the state filed a petition with the trial court alleging that he had violated his probation. The court then held a probation revocation hearing at which the defendant, being without funds, was not represented by counsel, even though Alaska Statutes § 12.55.110 provides that a defendant has the right to counsel in such a proceeding. Upon the conclusion of the hearing, the court revoked probation and imposed the balance of the three-year sentence.

On appeal the Supreme Court of Alaska decided that under the statute an indigent probationer had the same right to be represented by counsel as a probationer who had funds to retain counsel. The Court said:

To construe * * * [the statute] as embodying an intended dichotomy between probationers able to afford counsel and others, would, in our opinion, render the statute repugnant to the Equal Protection Clauses of both the Federal and Alaska Constitutions. *Hoffman v. State*, 404 P. 2d at 646.

The Alaska Court then pointed to this Court's opinions in *Lane*, *Douglas*, and *Griffin* as having struck down the

distinctions between the indigent and the man of means. With respect to these decisions, the Court said:

Admittedly these three decisions involved appeals in criminal cases and were not concerned with probation or parole issues, but as was observed by Judge Sobeloff, in reference to these cases in his concurring opinion in *Jones v. Rivers*, 338 F. 2d 862 at 876 (4th Cir. 1964): "[T]here is no reason to attach significance to their technical classification as criminal rather than civil; the underlying feature to be noted is the fact that the liberty of the individual was involved."

What we do today is to refuse to sanction any discriminatory application between indigent probationers and others in the administration of the right to counsel * * *. *Hoffman v. State*, 404 P. 2d at 646.

In *Perry v. Williard*, 427 P. 2d 1020 (1967) the Oregon Supreme Court was faced with the same issue. The Oregon practice with respect to the assistance of counsel at probation revocation proceedings was similar to the practice in the State of Washington in these cases. Those who could afford to employ counsel for probation revocation hearings did so frequently. Those who were indigent did not. The defendant Perry, an indigent, was sentenced after his conviction of a felony, but the sentencing court stayed the execution of the sentence and placed him on probation. Subsequently, at a hearing held without the presence or assistance of counsel, his probation was revoked. The Oregon Supreme Court, in reversing the trial court, discussed the applicability of the Equal Protection clause:

The prisoner argues and the state does not deny that it is not unusual for a probationer who can retain counsel to have the assistance of counsel at a revocation hearing. The presence of counsel in some cases

when it is denied in others gives rise to equal protection problems. See *Douglas v. California*, 372 U.S. 353 (1963); Kamisar and Choper, The Right to Counsel in Minnesota, Some Field Findings and Legal Policy observations, 48 Minn. L. Rev. 1, 94 (1963). [427 P. 2d at 1021-22.]

* * * * *

Recent decisions in our own court as well as the United States Supreme Court have been widening and deepening our commitment to individual liberty and to equality before the law. * * * It would be somewhat surprising now to hold for the first time that a wealthy person brought before the court for revocation of probation could not have the assistance of retained counsel to dispute the alleged grounds for revocation. We take judicial notice of the practice of many years standing which allows counsel to be heard in such proceedings in various circuit courts of this state. We now hold that counsel is not only desirable but is so essential to a fair and trustworthy hearing that due process of law when liberty is at stake includes a right to counsel.

Accordingly, if a probationer with money is entitled to retained counsel, an indigent is entitled to appointed counsel. As observed in another context, discrimination on account of poverty is as unjustifiable as discrimination on account of religion, race or color. [Citing *Griffin v. Illinois*] *We are aware that a proceeding to review performance on probation is not a criminal trial, but that distinction does not justify the denial of equal protection of the laws where liberty is concerned. Perry v. Williard*, 427 P. 2d at 1022-23 [emphasis added].

The Oregon Supreme Court returned the case to the trial court for a new revocation hearing in which counsel should be available unless expressly waived.

A similar argument was made by Judge Hamilton in his dissent in *Mempa v. Rhay*, no. 16, transcript, M.R. 57, *Mempa v. Rhay*, 416 P. 2d at 114, but was rejected by the majority of the Supreme Court of Washington. With respect to the majority's position, Judge Hamilton stated:

• • • Yet the majority would deny this right to indigents, thereby projecting discrimination between probationers who can afford counsel and those who cannot. Due process and equal protection prohibit the accident of economic ability from being a criterion for right to counsel. • • •

Of the several state court decisions denying a right to appointed counsel, to be discussed below in part II of our brief, only one, *Shum v. Fogliani*, 413 P. 2d 495 (Nev. 1966) deals with the issue of equal protection, and even there one judge of a three-judge court wrote a strong dissent. In *Shum* the court relied on the theory that probation is a matter of grace, which we discuss below in part IV of our brief.

B. A significant number of states other than Washington permit retained counsel in probation violation hearings but deny a right of assigned counsel.

We have collected information about the law and practice in courts located in all the states, utilizing the most recent data available from a variety of sources. This material appears in Appendix A. As shown in this Appendix, according to the practice in 17 states besides Washington, a probationer charged with a probation violation is entitled to have private retained counsel at the proceedings to revoke his probation but is denied a right to have counsel appointed if he is poor, except perhaps in one

or a few counties in the state, or where he makes a request for counsel, or depending on the policy of the individual judge who happens to hear the case. These states, according to the best information available, are Alabama, Arizona, Arkansas, Florida, Kentucky, Idaho, Iowa, Louisiana, Maine, Michigan, Nevada, New Hampshire, Ohio, South Carolina, Tennessee, Vermont, and Wyoming. The problem almost certainly occurs also in 12 other states, in certain counties: California, Colorado, Georgia, Indiana, Maryland, New Jersey, New York, North Carolina, Oklahoma, South Dakota, Utah, and Virginia, and probably also in Kansas and Nebraska.

Because the problem of lack of equal access to counsel seems so widespread among the states, the Court should declare that failure to appoint counsel violates the Equal Protection Clause. In *Douglas v. California*, 372 U.S. 353 (1963), this Court declared that although the Constitution does not require that the state provide a right of appeal, if it does so, then counsel must be provided for an indigent appellant if he wants one, so that he will still stand on the same footing as a defendant of means. Similarly, as the issue is framed in the present cases, this Court can rule that if the state permits retained counsel in a probation violation proceeding, it must also furnish appointed counsel for the probationer who is indigent.

II.

APART FROM EQUAL PROTECTION REQUIREMENTS, THE DUE PROCESS CLAUSE REQUIRES ASSIGNMENT OF COUNSEL.

A. A significant number of states recognize this principle by judicial decision, statute, or rule of court.

In the Petitioners' brief, pages 16-28 and 31-35, they set forth their position that the Due Process Clause requires that right to counsel at a probation violation proceeding be co-extensive with the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

As Petitioners point out, the sentencing that follows a revocation of probation where the original sentence had been deferred is the sentence on the original charge and is as much a part of the criminal prosecution as the arraignment and trial. Such revocation proceedings are therefore unquestionably a "critical" stage of the criminal process.

In view of Petitioners' discussion of these points we will omit discussion of them.

We do wish to point out, however, that ten states have recognized the principle that counsel ought to be appointed in probation violation proceedings as a matter of fundamental fairness to the defendant. A detailed summary of the law in each state appears in the "assigned counsel" portions of Appendix A. The table shows judicial decisions in Illinois, New Mexico, New York (4th Dept.), Oregon, Pennsylvania, and Wisconsin. Massachusetts has a judicial decision to this effect construing a rule of court. Statutes requiring appointment of counsel have been enacted in Hawaii, Minnesota, and Texas. Alaska should probably be added to the list, since its Supreme Court

has construed its statute as requiring appointment of counsel, albeit on a theory of equal protection. These eleven states are located in all sections of the country and include four of the ten most populous states and about one fourth the total population of the United States, according to the 1960 census.

Furthermore, although not required to do so by any statute, judicial decision, or statewide rule of court, many individual courts are appointing counsel, as shown in Appendix A. This is further evidence that the Due Process principle is widely recognized and followed in practice.

The state cases deserve careful attention, for they show that the Due Process principle has been applied both to cases arising from an original suspension of the *imposition* of sentence and cases arising from an original suspension of the *execution* of sentence. The following cases applied the principle where the *imposition* of sentence was suspended:

Gebhart v. Gladden, 243 Ore. 145, 412 P. 2d 29 (1966); *People v. Price*, 24 Ill. App. 2d 364, 164 N.E. 2d 528 (1960); *Smith v. State*, 33 Wis. 2d 695, 148 N.W. 2d 39 (1967). *In Re Levi*, 39 Cal. 2d 41, 244 P. 2d 403 (1952); *In Re Perez*, 53 Cal. Rep. 414, 418 P. 2d 6 (1966). In the following cases execution of sentence was suspended: *People v. Hamilton*, 26 A.D. 2d 134, 271 N.Y.S. 2d 694 (4th Dept. 1966); *Williams v. Commonwealth*, 350 Mass. 732, 216 N.E. 2d 779 (1966); *Blea v. Cox*, 75 N.M. 265, 403 P. 2d 701 (1965); *Perry v. Williard*, 427 P. 2d 1020 (Ore. 1967). None of the three statutes providing a right to assigned counsel makes any distinction between the two types of revocation, and the Minnesota Statutes, §§ 611.14 subd. (c) and 609.14 even refer to both fact situations. Massachusetts Supreme Judicial Court Rule 10 simply applies

to any crime "for which a sentence of imprisonment may be imposed." Cf. *Com. ex rel. Rémeriez v. Maroney*, 415 Pa. 534, 204 A. 2d 451 (1964) (type of suspension of sentence not shown).

We submit that there is no distinction between the two types of sentencing imposed upon revocation of probation. The two decisions in Oregon are particularly instructive: the Oregon Supreme Court could see no distinction between a case of suspension of the *imposition* of sentence, *Gebhart v. Gladden*, 243 Ore. 145, 412 P. 2d 29 (1966), which is like the two cases at bar, and a case of suspension of the *execution* of sentence. *Perry v. Williard*, 427 P. 2d 1020 (Ore. 1967). In either fact situation the liberty of one convicted of a serious crime is at stake, and the proceeding is clearly either a part of the criminal prosecution or a closely related matter. The right of counsel must be extended to these proceedings if the Court is to be consistent with its previous decisions relating to other stages in the criminal process, such as *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gilbert v. California*, 87 Sup. Ct. 1951 (1967); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963); *Gideon v. Wainwright*, 372 U.S. 355 (1963); *Townsend v. Burke*, 334 U.S. 736 (1948); *Douglas v. California*, 372 U.S. 353 (1963); *Anders v. California*, 386 U.S. 738 (1967).

A discussion of the Due Process issue is incomplete without reference to the state decisions that deny a right to assignment of counsel. Two of these, *Edwardsen v. State*, 220 Md. 82, 151 A. 2d 132, 136 (1959), and *People v. St. Louis*, 3 A.D. 2d 883, 161 N.Y.S. 2d 170. (3d Dept. 1957) may be discredited as being decided several years before the *Gideon* and related decisions. The language of the Maryland case clearly shows that the court's thinking

was dominated by *Betts v. Brady*, 316 U.S. 455 (1942); the New York case barely discusses the question and cites no authority. The case of *Phillips v. State*, 165 So. 2d 246 (Fla. App. 2d Dist. 1964) denies a right to assigned counsel at a probation revocation hearing but recognizes a right at the sentencing that follows upon a revocation. Neither *Phillips* nor *Thomas v. State*, 163 So. 2d 328 (Fla. App. 3d Dist. 1964) affords much discussion of the question. Chief reliance is on Florida precedents and a District of Columbia Circuit decision denying appointed counsel in a federal parole revocation proceeding. *People v. Wood*, 2 Mich. App. 342, 139 N.W. 2d 895 (1966) does not venture beyond Michigan authorities and a Seventh Circuit decision denying a right to appointed counsel in federal parole revocation. The Due Process issue is scarcely considered. In *Thomas v. Maxwell*, 175 Ohio St. 233, 193 N.E. 2d 150, 152 (1963) a right to assigned counsel is denied but a right to retained counsel is recognized. The court relies entirely on Federal decisions stemming from the dictum in *Escoe v. Zerbst*, 295 U.S. 490 (1935), that there is no constitutional but only a statutory right to a hearing under the federal probation statute. See Petitioners' brief p. 26. Another case citing the same type of authorities is *Shum v. Fogliani*, 413 P. 2d 495 (Nev. 1966), a 2-1 decision. Finally the case of *Franklin v. State*, 87 Idaho 291, 392 P. 2d 552, 555 (1964), also relying on federal decisions, seems to deny even a right to retained counsel. Additional authority contrary to our position may be found in state cases denying a right to a hearing; *a fortiori*, these cases are inconsistent with a right to have assigned counsel at such a hearing, e.g., *State v. Small*, 386 S.W. 2d 379 (Mo. 1965); *Ex Parte Davis*, 37 Cal. 2d 872, 236 P. 2d 579 (1951) (suspension of execution of sentence.)

We submit that these decisions are wrong and that the state authorities previously discussed present the better view for the reasons already mentioned.

- B. Most state courts conduct a hearing on the issue of violation of probation, at which the defendant is present and has a right to be heard, and at which the state is represented by counsel. The defendant is at an unfair disadvantage if he does not have the assistance of counsel.**

An excellent study of probation and parole revocation statutes and practices was made in 1962 by Ronald Sklar. *The Revocation of Parole and Adult Probation*, available by interlibrary loan from Northwestern University School of Law, Chicago; see condensed version, "Law and Practice in Probation and Parole Revocation Proceedings," 55 *J. Crim. Law, Crim. & Pol. Sci.* 175 (1964). Sklar's summary of the statutory provisions is still accurate with a few exceptions. (*) As updated, Sklar's summary shows

(*) Delaware Code Ann., § 4335(c), enacted in 1964, provides for an informal or summary hearing on a violation of probation. Thus Delaware moves from group I to group V in the Sklar table in 55 *J. Crim. L., Crim. & P.S.* 176-182. The Indiana statute was amended in 1967 so as to provide that the probationer "may be represented by counsel of his choice." This would move Indiana from group IV to group VI. The new Texas Code of Criminal Procedure, art. 42.12, § 8 continues the requirement of a hearing, and § 3b adds a provision for retained or assigned counsel. Thus Texas would also move from group IV to group VI. Minnesota and Hawaii have enacted statutes providing for assignment of counsel, although the probation provisions have not been changed. See Appendix A. In other states the section numbers have been altered by recom compilations, reenactments, etc. No attempt is made here to report changes in parole statutes listed by Sklar.

the following: Only three states authorize revocation without a hearing (Iowa, Missouri, Oklahoma). Seven states and the District of Columbia have statutes that do not indicate whether a hearing is required (Arizona, Arkansas, California, Massachusetts, Nebraska, South Dakota, Utah), although as shown in the Appendix, court decisions in several of these states require that a hearing be held. The statutes of seven states imply that a hearing is required, usually by a provision that the probationer is to be brought before the court (Alaska, Kentucky, Mississippi, Nevada, Pennsylvania, Rhode Island, Virginia, Washington, Wisconsin, Wyoming). In most of these states the supreme courts have ruled that a hearing is to be held. This Court has so construed a similar provision in the federal statute. *Escoe v. Zerbst*, 295 U.S. 490 (1935). The statutes of all the remaining states expressly require hearings, although some statutes provide that the hearing may be summary or informal, or they have other special provisions about the hearing. The state court decisions are collected in an annotation in 29 *A.L.R. 2d* 1074-1140 (1953) and Supplemental Service. Cf. Note, "Legal Aspects of Probation Revocation," 59 *Colum. L. Rev.* 311 (1959); Comment, "Due Process and Revocation of Conditional Liberty," 12 *Wayne L. Rev.* 638 (1966).

The longer version of Sklar's study has much factual data based on answers to questionnaires sent to state probation offices or, in some instances, offices in the most populous counties of a state. The study reveals that it is a universal practice to have the probationer present and that virtually everywhere he is permitted to make a statement and present evidence by witnesses or otherwise. One may ask, how can he do this effectively without the

assistance of counsel? A right to cross-examine witnesses produced by the state is also recognized in most jurisdictions. And how valuable is this right without the aid of counsel? See *Pointer v. Texas*, 380 U.S. 400 (1965). In most states a written report is submitted to the court by the probation officer, and in some states the probationer is allowed to see a copy of it. But how effectively can the typical indigent defendant oppose such a report without the aid of a lawyer?

The National Legal Aid and Defender Association, as a part of its preparation for this case, circulated questionnaires among its defender members and among prosecutors and probation offices located in the same cities as the defender members. These were supplemented by questionnaires to probation offices in large cities not already included. Responses were received from 53 defender members located in 19 states; from 37 prosecutors in 15 states; and from 50 probation offices in 23 states, including several statewide probation offices.

Responses from the defender members and prosecutors show that the state is regularly represented in probation violation proceedings in their local courts in 15 states and the District of Columbia. The states are California, Colorado, Connecticut, Florida, Illinois, Indiana, Minnesota, Missouri, Nevada, New York, Ohio, Pennsylvania, Texas, Utah, and Wyoming. Respondents from offices in four states report that the state is sometimes represented (Arizona, California, New York, Ohio), while respondents from six states said the state is not represented. The fact that some states (Colorado, Kansas, Maryland, Missouri, Ohio, Pennsylvania) are listed more than once indicates a disparity in practice from one coun-

ty or judicial circuit to another. These returns, while not conclusive, are sufficient to show that in a significant number of jurisdictions the state regards the probation violation hearing as sufficiently important and complex to have its lawyer there either regularly or in some cases. Indeed, this is just what occurred in the two cases before the Court. See the transcript in *Mempa v. Rhay* (M.R. 24-27), and in *Walking v. Rhay* (W.R. 15-18).

We will not belabor the point that the defendant is at a serious disadvantage in a proceeding where the state has counsel but he has none, and where he has a right to a hearing but cannot have counsel to assist him. This point is thoroughly covered in Petitioners' brief at pages 22-25. We would, however, point out to the Court that this problem exists not only in Washington but in several other states as well. As shown in Appendix A, in ten states where there is no right to assigned counsel, the responses indicate that the state has counsel regularly or at least "sometimes." The states where this one-sided arrangement prevails, at least in some counties, are Arizona, California, Colorado, Florida, Indiana, Missouri, Nevada, Ohio, Utah, and Wyoming. It is probably safe to say that the same situation can be found in most if not all the other states where a right to assigned counsel is denied.

C. Expert opinion favors a right of assigned counsel for probation violation proceedings.

The overwhelming weight of informed expert opinion supports the position that assigned counsel should be provided for a probation violation proceeding. The recent report of the President's Commission on Crime and the

Administration of Justice takes this position. The Commission reported:

The criminal trial process is not the only one in which a person may be deprived of his liberty. The revocation of probation and parole presents an equal threat, and though the legal issues in such proceedings are seldom complicated, the factual issues may be

The Commission recommends:

Legal assistance should be provided in parole and probation revocation proceedings—*The Challenge of Crime in a Free Society*, A Report by the President's Commission on Law Enforcement and Administration of Justice, p. 150 (1967).

In its supporting task force report the Commission made the same point in greater detail:

Probation and parole revocation hearings may involve both disputed issues of fact and difficult questions of judicial or administrative judgment. These hearings lack some of the evidentiary and other technical complexities of trials, but where the facts are disputed, the same process of investigating, marshaling, and exhibiting facts is often demanded as at trial. A lawyer for the defense is needed in these proceedings because of the range of facts which will support revocation, the breadth of discretion in the court or agency to refuse revocation even though a violation of the conditions of release is found, and the absence of other procedural safeguards which surround the trial of guilt. *Task Force Report: The Courts*, Task Force on Administration of Justice, President's Commission on Law Enforcement and Administration of Justice, p. 54 (1967).

The American Bar Association, on the recommendation of its Standing Committee on Legal Aid and Indigent

Defendants, has approved the Minimum Standards for a Defender System as originally promulgated by the National Legal Aid and Defender Association. See 91 A.B.A. Reports 116, 186, 189-90 (1966). The standards provide in part as follows:

Every defender system should:

1. Provide legal representation for every person who is without financial means to secure competent counsel when charged with a felony, misdemeanor, or other charge where there is a possibility of a jail sentence.

3. Provide representation immediately after the taking into custody or arrest, at the first and every subsequent court appearance and at every stage in the proceeding, including appeal or other post-conviction proceedings to remedy error or injustice. The representation should extend to parole and probation-violation proceedings, extradition, proceedings, and proceedings involving possible detention or commitment of minors or alleged mentally ill persons.

8. Provide effectual notice of the available services to all persons who may be in need thereof. [Emphasis added.]

The American Bar Association Project on Minimum Standards for Criminal Justice, under the general chairmanship of Chief Judge J. Edward Lumbard of the Second Circuit, has recently reported a tentative draft of *Standards Relating to Providing Defense Services* (American Bar Association, Chicago, 1967). The standards were developed by the Advisory Committee on the Prosecution and Defense Functions, headed by Judge Warren E. Burger of the District of Columbia Circuit. The recommended standard on collateral proceedings, at page 40, provides as follows:

4.2 Collateral proceedings.

Counsel should be provided in all proceedings arising from the initiation of a criminal action against the accused, including extradition, mental competency, post-conviction and other proceedings which are adversary in nature, regardless of the designation of the court in which they occur or classification of the proceedings as civil in nature.

The commentary following this standard, at page 43, indicates that the committee intended the standard to apply to any probation revocation proceeding that is adversary in nature.

The most useful way to view the scholarly writing and model legislation in this field is to line it up in chronological order. The first important study was the *Attorney General's Survey of Release Procedures*, Department of Justice, Washington, 1939, which included a 479-page report on Probation (Volume II). Provisions for notice and hearing are discussed at pages 328-33, but scarcely anything is said about a right to counsel, either retained or assigned. Wiehofen, writing in 1942, also directed his attention to the hearing, or the need for one. "Revoking Probation, Parole or Pardon Without a Hearing," 32 *J. Crim. L. & Pol. Sci.* 531. Two student notes published in the 1950's also concentrate on Due Process rights connected with the hearing, but they include the right to counsel. 28 *So. Cal. L. Rev.* 158 (1955); 59 *Colum. L. Rev.* 311 (1959). The Columbia note urges that a right to retained counsel be recognized, but hesitates as to the right of assigned counsel.

Also in this period the National Probation and Parole Association (now the National Council on Crime and De-

linquency) published a revised edition of its *Standard Probation and Parole Act* in 1955. Section 17 of the Act requires that a hearing be held when a violation of probation is charged, although the hearing may be "informal or summary."

In 1962, the National Council on Crime and Delinquency published *Standards and Guides for Adult Probation*. This book says at page 55:

(Every alleged violation need not result in a hearing by the judge. Many times the probation officer and judge in informal conversation can reach a decision without a hearing. The probationer should be informed of the specific violation and should be allowed representation by counsel at the hearing. The hearing should be informal.

The next pronouncement from the National Council on Crime and Delinquency was in a book written by its staff counsel and published in 1963:

Most of the rulings and probably the better practice require that the court conduct a hearing on the alleged violation, that the hearing be preceded by notice of the charge, that the probationer have a right to be represented by counsel and to rebut the charges, and that charges must be established by substantial evidence. . . Rubin, *Criminal Correction* 207 (1963).

The manuscript having been prepared before the *Gideon* and related decisions, the author did not consider their implications. These three publications show a growing recognition of the importance of counsel. The Standard Act requires only that a hearing be held. The 1962 manual says that counsel should be allowed if there is a hearing, and implies that a hearing should be held if

there is an issue of fact. The 1963 treatise says that the "better practice" requires a hearing with a right to be represented by counsel.

Sklar, writing in 1962, asserted that the principal elements of fairness in the hearing are reasonable notice, a right of cross examination, and a right to offer evidence. He recognized that counsel can be helpful but was then satisfied not to recommend any extension of the rights to retained and assigned counsel beyond the law as then established by rulings of this Court. Sklar, *Revocation of Parole and Adult Probation* 251-60, 266 (1962), available by interlibrary loan from Northwestern University School of Law, Chicago; a shorter version is in 55 *J. Crim. L., Crim. & Pol. Sci.* 175 (1964).

The American Law Institute's *Model Penal Code*, Proposed Official Draft, 1962, submitted a year before the *Gideon* and *Douglas* decisions, has the following provision:

Section 301.4. Notice and Hearing on Revocation
or Modification of Conditions of Suspension or
Probation

The Court shall not revoke a suspension or probation or increase the requirements imposed thereby on the defendant except after a hearing upon written notice to the defendant of the grounds on which such action is proposed. The defendant shall have the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel.

The provision indicates that the ALI recognized the importance of the right to be represented by counsel at a probation violation hearing, although the language does not specifically provide for appointment of counsel for a

defendant who is indigent. Thus the model provision is similar to the Alaska statute construed in *State v. Hoffman*, 404 P. 2d 644 (1967), as requiring appointment of counsel for an indigent defendant on equal-protection grounds.

Beginning with the article by Professor Kadish, "The Advocate and the Expert-Counsel in the Peno-Correctional Process," 45 *Minn. L. Rev.* 803 (1961), a different theme is sounded. The importance of counsel, including assigned counsel, is recognized and advocated. See passage quoted in Petitioners' brief at pages 23-24. Other recent publications follow the same theme. Kamisar & Choper, "The Right to Counsel in Minnesota," 48 *Minn. L. Rev.* 1, 96 (1963); Kean, "Due Process Applied to Hearings for the Revocation of Juvenile Probation," 16 *Juv. Ct. Judges J.* 178 (1966); Hink, "Application of Constitutional Standards of Protection to Probation," 29 *U. Chi. L. Rev.* 483, 494 (1962); Comment, 12 *Wayne L. Rev.* 638, 650-54, 656 (author recognizes need for assigned counsel at least in any formal adversary proceeding). Even a chief federal probation officer in Philadelphia says:

With the recent decisions of the Supreme Court that a defendant be represented by counsel at every step of due process, it would seem that the probationer's attorney should be present at the hearing. . . . DiCerbo, "When Should Probation Be Revoked?" *Federal Probation*, June, 1966, pp. 11, 15.

This observation is quite significant because it indicates that even in the federal system, where the question of right to counsel has not been decided by this Court, a chief probation officer recommends that assigned counsel be provided.

As a part of the American Bar Foundation survey of defense of indigent persons in 1963-64, judges and prosecutors in each state were asked whether they thought counsel should be provided for indigent persons in probation revocation proceedings under an ideal system, also whether they thought it would be unfair if counsel were not provided. Responses showed that in 16 states a majority of both judges and prosecutors said that counsel should be provided; that in 10 additional states prosecutors alone took this position, and that in 3 states judges alone did so. 1 Silverstein, *Defense of the Poor* 143-44 (1965); details for each state appear in the state reports, vols. 2 and 3.

As part of its preparation for these cases, NLADA circulated questionnaires to prosecutors located in the same cities as its defender members. The questionnaire included these questions, quite similar to those asked by the American Bar Foundation:

Under an ideal system, assuming the state is represented by counsel, should an indigent defendant be provided with counsel at probation revocation proceedings?

A. Felony (as defined above) revocation?

Yes..... No.....

B. Misdemeanor (as defined above) revocation?

Yes..... No.....

Assuming the state is represented by counsel, is it unfair to an indigent defendant if he does not have counsel at:

A. Felony (as defined above) revocation?

Yes..... No.....

B. Misdemeanor (as defined above) revocation?

Yes..... No.....

NLADA received responses from 37 prosecutors in 15 states. Thirty-four answered the felony part of first question "yes," two said "no," and one said "sometimes." Even on the misdemeanor part of the first question, the vote was 26 to 11 in favor of providing counsel. On the second question, for felonies, 26 said "yes," 8 said "no," and two said "not necessarily." For misdemeanors the vote was 21 "yes," 13 "no," and 3 "not necessarily" or "depends on which judge is sitting."

These responses to the American Bar Foundation and NLADA questionnaires seem especially persuasive since they are from people intimately involved in the criminal process—trial judges and prosecuting attorneys. If such a large number of prosecutors—the majority of prosecutors responding in 26 states in the Bar Foundation survey and a strong majority in the NLADA canvass—feel that counsel should be provided, the Court must give the matter careful consideration, for these are officials whose primary function is to represent the interest of the state.

III.

A CONSTITUTIONAL REQUIREMENT OF ASSIGNMENT OF COUNSEL WOULD NOT UNDULY BURDEN THE STATES.

A. Counsel is already being assigned in approximately half the state trial courts in the United States.

As we have pointed out in part II A of our brief, 11 states require appointment of counsel: Alaska, Hawaii, Illinois, Massachusetts, Minnesota, New Mexico, New York (part of the state), Oregon, Pennsylvania, Texas, and Wisconsin. Moreover, counsel is in fact being appointed

to some extent in at least 24 other states, according to data gathered by Sklar in 1962, by the American Bar Foundation in 1963-64, and by ourselves in 1967, all as set forth in Appendix A. These states are Alabama, Arkansas, California, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Virginia, and West Virginia. The 11 states in the first group, together with a significant number of counties in the states in the second group, comprise roughly half of the population of the United States, and probably more than half of the criminal prosecutions, since many urban states and counties are included.

Among defender offices representation in probation violation proceedings is quite common. The American Bar Foundation reported that most of the defenders interviewed were handling such cases. 1. Silverstein, *Defense of the Poor* 143 (1965). Of 50 defender offices replying to the questionnaire we circulated in July, 1967, in connection with these cases, 36 offices located in 14 states reported that they handle such cases, while 14 offices located in 9 states said they do not, usually because under local practice no appointment is made. For example, in 1966 the Philadelphia Defender Association reported 490 cases. Other examples are Syracuse, 30; Fort Lauderdale, 27; Chicago, 211; Brighton, Colorado, 36; Salt Lake City, 25; San Francisco, 374; Santa Clara, 119 (1965 figure).

B. The total number of probation revocations is not large.

The President's Commission on Law Enforcement and the Administration of Justice reported 144,000 persons

were placed on adult probation in 1965 in the state courts, and for that year the average daily population of persons on probation was 230,000. *Task Force Report: Corrections* 202 (1967). Apparently these figures refer to felonies since a separate figure is given for misdemeanors.

Figures on the number and percentage of defendants placed on probation in representative counties can be found in the docket studies in the American Bar Foundation state reports. 2 & 3 Silverstein, *Defense of the Poor*, passim (1965).

What proportion of the defendants on probation have it revoked? Figures for representative cities for the years 1965 and 1966, as collected by the amicus from probation offices, are given in Appendix B. The first two columns list the number of defendants placed on probation; the last two show the number of revocations. Adding all the figures together, we find that for 1965 revocations were 29% of the number of defendants placed on probation, and for 1966 the figure was 24%. The Attorney General's study reported 19% revocations. *Attorney General's Survey of Release Procedures*, vol. II, *Probation*, 335-42 (1939). This study also reported total violations of about 40% of those placed on probation. In the federal system 18% of those on probation in 1965 were removed from probation because of a violation. *Annual Report of Director of Administrative Office of United States Courts* 127 (1966). The National Council on Crime and Delinquency has informed us by letter that in North Carolina in 1965 the number of probation cases terminated by revocation was 20% of the number received on probation, and for Connecticut the corresponding figure was less than

10%. For Nevada and Utah the figure was also about 10%, as reported to NLADA.

These statistics tend to show that the number of revocations is roughly 20% of the number of cases placed on probation; the number of defendants charged with violations would be somewhat higher, of course, since some violations do not result in revocation. Using this figure of 20%, and the figure of 144,000 persons placed on probation, we find that the number of revocations for all state courts is about 29,000 per year, or even if the 20% ratio is applied to the total caseload of 230,000, the number of cases is no more than 46,000.

C. Counsel can be provided within existing systems of representation.

We have shown that counsel is already being provided in about half the state trial courts, and that in any event the number of cases is not large. Moreover, some defendants can retain private counsel. To meet its present obligations to provide representation to poor persons at the arraignment and trial stage of the prosecution, every trial court has either a defender system or an assigned counsel system. It would be a simple matter to extend this system to probation revocation proceedings. The same lawyer originally assigned could simply be called back to court for this later stage of the case. He would already know the defendant and have a file on the case. Since the proceeding usually takes only a short time, the burden on the lawyer should be minimal.

D. Providing counsel would not interfere with probation administration.

It is sometimes argued that the probation system would suffer if burdened with a system of hearings with attorneys present. The answer to this contention is found in the very large number of probation systems now operating with the presence of retained counsel or assigned counsel or both. Moreover, the National Council on Crime and Delinquency's authoritative handbook, *Standards and Guides for Adult Probation* (1962) does not even mention this as a possible problem, nor is it readily found in other recent literature on probation.

IV.

FOR CONSTITUTIONAL PURPOSES PROBATION SHOULD BE CHARACTERIZED AS A FORM OF LIBERTY AND NOT A MERE PRIVILEGE OR FAVOR.

The terms "privilege," "favor," or "grace" properly refer to a sentencing court's discretion in granting probation to a convicted defendant, but not to the status of probation itself. It is submitted, however, that these labels do not permit a court unbridled power to revoke probation once it has been granted. Nor, indeed, is it necessary to characterize probation as a privilege. The Illinois Appellate Court put it this way:

Our courts have never taken the view that it is a mere matter of favor or grace to admit a defendant to probation. When an order to that effect is entered by a court, the court has satisfied itself that the defendant is not likely to again engage in an offensive or criminal course of conduct and that the public good does not require that the defendant shall suffer the penalty provided by law. * * * The fact

that a person has been adjudged guilty of a criminal offense and subsequently granted probation should not deprive him of a fair, orderly hearing according to accepted judicial principles and recognized standards of procedure when it is sought to terminate that order. When an order granting probation has been entered and the court has imposed the conditions upon which defendant may be at liberty, the defendant has a right to rely thereon and as long as he complies with those conditions his liberty of action or freedom should not be restricted. * * * *People v. Price*, 24 Ill. App. 2d 364, 377, 164 N.E. 2d 528, 534 (1960).

We submit that this characterization of probation is today more accurate than the dictum in *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935): "Probation or suspension of sentence comes as an act of grace to one convicted of a crime. * * *" This dictum has been widely quoted in the state courts as a justification for denying a right of assigned counsel and other Due Process rights.

Even if probation is characterized as a privilege or act of grace, it is entitled to considerable protection. This Court and other courts have extended protection to other "privileges" that do not involve a person's liberty, e.g. the right to practice law cannot be denied without a fair hearing that establishes reasonable cause. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957). Furthermore, once the right to practice has been granted, revocation of the right raises entirely different and more substantial problems than are involved in determining whether the privilege should be granted initially. See *Massengale v. United States*, 278 F. 2d 344 (6th Cir. 1960). Public employment is also generally categorized as a

"privilege" and not a "right," but it too is a privilege that cannot be arbitrarily revoked. *Greene v. McElroy*, 360 U.S. 474 (1959). The receipt of Social Security benefits, doing business with the government, and obtaining a radio operator's license have all been characterized as privileges, not rights, yet they cannot be denied without a fair procedure. *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); *Copper Plumbing & Heating Company v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961). See also *Slochower v. Board of Education*, 350 U.S. 551 (1956).

It is submitted there is no distinction between "rights" and "privileges" that would compel absolute protection for the former yet justify arbitrary invasion and denial of the latter. There are simply different degrees of protection.

To break out of the right-privilege circle, it would be more useful to speak of a single category of "benefits". This category runs the gamut from the most securely protected activities sanctioned or underwritten by government (such as the practice of the basic professions under government license), to the most ephemeral government gratuities (bonus payments or rewards for valor, for example). Thus, no distinction need be drawn at any arbitrary point between 'rights' and 'privileges'; it need only be recognized that in terms of the interests both of the donor and of the recipient, some forms of government benefits are more valuable than others, and should be more fully safeguarded. But the withdrawal or conditioning of all types of benefits should be analysed according to the same constitutional principles. O'Neil, "Unconstitutional Conditions: Welfare Benefits With Strings Attached," 54 *Calif. L. Rev.* 443, 445-46 (1966).

What form of "benefit," "privilege," or "grace" is more valuable to an individual probationer than his liberty and

freedom from incarceration? And his right to return to his community, his family and his job, albeit it subject to certain conditional restrictions? The label of "privilege," "favor," or "grace" should not be used to deprive a defendant of these vitally important benefits without full procedural safeguards consistent with our concepts of basic fairness, including the right to counsel. To do so relegates such proceedings to a status having less constitutional and procedural protection than the right to practice law, obtain public employment, or Social Security, or other economic "benefits" referred to above. This, we submit, is intolerable in a proceeding so vital to the liberty and other interests of a defendant, as well as the interests of our society in rehabilitation and not punishment.

CONCLUSION.

For the reasons stated we respectfully submit that the judgments of the Supreme Court of Arizona in these two cases should be reversed, and that the cases should be remanded with directions to issue the writs of habeas corpus and for further proceedings in accordance with the opinion of the Court.

Respectfully submitted,

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